

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

LORENZO STEWART,

No. C 10-02376 CW (PR)

Plaintiff,

ORDER OF DISMISSAL

v.

SHERIFF WARREN E. RUPF, et al.,

Defendants.

Plaintiff, a state prisoner, has filed a pro se complaint under 42 U.S.C. § 1983, alleging constitutional violations that occurred while he was housed at the Martinez Detention Facility. He has been granted leave to proceed in forma pauperis. Plaintiff has not exhausted California's prison administrative process, however.

The Prison Litigation Reform Act of 1995 (PLRA) amended 42 U.S.C. § 1997e to provide that "[n]o action shall be brought with respect to prison conditions under [42 U.S.C. § 1983], or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a). Under this section, an action must be dismissed unless the prisoner exhausted his available administrative remedies before he filed suit, even if the prisoner fully exhausts while the suit is pending. See McKinney v. Carey, 311 F.3d 1198, 1199 (9th Cir. 2002). "[T]he PLRA's exhaustion requirement applies to all inmate suits about

1 prison life, whether they involve general circumstances or  
2 particular episodes, and whether they allege excessive force or  
3 some other wrong." Porter v. Nussle, 534 U.S. 516, 532 (2002).  
4 Exhaustion of all "available" remedies is mandatory; those remedies  
5 need not meet federal standards, nor must they be "plain, speedy  
6 and effective." Id. at 524; Booth v. Churner, 532 U.S. 731, 739-40  
7 & n.5 (2001). Even when the prisoner seeks relief not available in  
8 grievance proceedings, notably money damages, exhaustion is a  
9 prerequisite to suit. Id. at 741. PLRA's exhaustion requirement  
10 requires "proper exhaustion" of available administrative remedies.  
11 Woodford v. Ngo, 548 U.S. 81, 94 (2006). The purposes of the  
12 exhaustion requirement include allowing the prison or jail to take  
13 responsive action, filtering out frivolous cases and creating an  
14 administrative record. See Porter, 534 U.S. at 525.

15 Section 1073 of Title 15 of the California Code of Regulations  
16 provides county jail inmates with a right to "appeal and have  
17 resolved grievances" relating to their confinement. Cal. Code  
18 Regs. tit. 15, § 1073.

19 Non-exhaustion under § 1997e(a) is an affirmative defense  
20 which should be brought by defendants in an unenumerated motion to  
21 dismiss under Federal Rule of Civil Procedure 12(b). Wyatt v.  
22 Terhune, 315 F.3d 1108, 1119 (9th Cir. 2003). However, a complaint  
23 may be dismissed by the court for failure to exhaust if a prisoner  
24 "conce[des] to nonexhaustion" and "no exception to exhaustion  
25 applies." Id. at 1120. Here, Plaintiff concedes he has not  
26 exhausted his administrative remedies. He alleges that he  
27 "submitted three complaints against staff misconduct" after the  
28 alleged incident involving the violation of his constitutional

1 rights on March 2, 2010; however, he claims he has not yet received  
2 a response. (Compl. at 2.) Instead of waiting for a response to  
3 his grievances, Plaintiff filed the present civil rights action on  
4 May 5, 2010. Plaintiff has not presented any extraordinary  
5 circumstances which might permit him to be excused from complying  
6 with PLRA's exhaustion requirement. Cf. Booth, 532 U.S. at 741 n.6  
7 (courts should not read "futility or other exceptions" into  
8 § 1997e(a)).

9 Accordingly, the complaint is DISMISSED without prejudice to  
10 refiling after exhausting California's prison administrative  
11 process. See McKinney, 311 F.3d at 1199-1201.

12 The Clerk of the Court shall enter judgment in accordance with  
13 this Order, terminate all pending motions, and close the file.

14 IT IS SO ORDERED.

15 Dated: 10/12/2010



16 CLAUDIA WILKEN  
17 UNITED STATES DISTRICT JUDGE  
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UNITED STATES DISTRICT COURT  
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NORTHERN DISTRICT OF CALIFORNIA

LORENZO STEWART,

Plaintiff,

v.

WARREN E. RUPF et al,

Defendant.

Case Number: CV10-02376 CW

**CERTIFICATE OF SERVICE**

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

That on October 12, 2010, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

Lorenzo Stewart CC09BL509  
Contra Costa County Jail Martinez  
901 Court Street  
Martinez, CA 94553

Dated: October 12, 2010

Richard W. Wieking, Clerk  
By: Nikki Riley, Deputy Clerk

United States District Court  
For the Northern District of California